

FINAL STATEMENT OF REASONS:

The California Department of Corrections and Rehabilitation (CDCR) proposes to amend Section 3378 of the California Code of Regulations, Title 15, Division 3, Documentation of Critical Case Information. This action is necessary to ensure clarity in the interpretation of what evidence can be considered a direct link for gang validation purposes and to provide uniformity relative to the documentation of gang validation information. The intent is to uniformly interpret and apply the term “Direct Link” to all evidence considered in Prison Gang validation consistent with the agreed language adopted in the *Castillo v. Alameida* Settlement Agreement for use of photographs to establish association/direct link with validated prison gang members or associates.

This action is necessary to preserve the purpose and goals of documenting critical case information, ensuring the safety and security of institutions, staff, and inmates and avoiding future costly litigation and unnecessary expense to the taxpayers of the State of California.

3378. Documentation of Critical Case Information.

Subsections 3378(a) through 3378(c)(2) are unchanged.

Subsection 3378(c)(3) is amended to clarify how to identify and validate if an inmate/parolee or any person has been accepted into membership in a gang. New text “or any person” has been added to the reference “inmate/parolee” to now reference “inmate/parolee or any person.” This is necessary in order to correctly clarify and provide that this validation is not only for an inmate/parolee, which was restricting, but is to correctly include any person.

The specific language “or any person who is validated by the department within six (6) months of the established or estimated date of activity identified in the evidence considered” is also added. This language is necessary to be consistent, in part, with provisions of the *Castillo v. Alameida* settlement agreement which states in part “...at the time the photograph is taken, at least one person in the photograph shall have been validated or be validated no more than six months after the date the photograph was taken.” The intent of this change is to uniformly interpret and apply the term ‘direct link’ to all evidence considered in prison gang validation including photographs as a source item to establish association/direct link with validated prison gang members or associates.

Subsection 3378(c)(4) is amended to clarify how to identify and validate if an inmate/parolee or any person who is involved periodically or regularly with members or associates of a gang is an associate. The reason for the addition of “any person” and the addition of the text “...or any person who is validated by the department within six (6) months of the established or estimated date of activity identified in the evidence considered” is the same as described above in Subsection 3378(c)(3).

Subsections 3378(c)(5) through 3378(c)(6)(B) are unchanged.

Subsections 3378(c)(6)(C) through 3378(c)(6)(E) are amended to include the word “parolee” to be consistent with the references to “inmate/parolee” throughout the text.

Subsections 3378(c)(6)(F) through 3378(c)(8)(A) are unchanged.

Subsection 3378(c)(8)(B) is amended to include the words “or symbol” to be consistent with the references to “tattoo or symbol” throughout the text.

Subsection 3378(c)(8)(C) is unchanged.

Subsection 3378(c)(8)(D) is amended to add the term “and/or associates” to gang “members” when a photograph with gang connotations is utilized as a source to establish association/direct link to validate an individual as a gang member or associate by the Department. This addition to the language is necessary to include members and/or associates of the gang depicted in the picture. This language is consistent with language used throughout this section.

Subsection 3378(c)(8)(E) is unchanged.

Subsection 3378(c)(8)(F) is amended to change the word “course” to “source.” In doing research, the Department found this to be a typographical error. Under the regulation File Number 06-043-21-03S, the word “source” was in the text and for some unexplained reason the was changed to course in the official Westlaw version. Therefore, the Department will submit final text with a correction to now change the word back to “source.” This should be considered a non-substantive change for corrective purposes. There are no other changes to this subsection.

Subsections 3378(c)(8)(G) through 3378(f) are unchanged.

Subsection 3378(g) is amended to include the word “parolee’s” to be consistent with the references to “inmate/parolee” throughout the text.

Subsection 3378(h) is unchanged.

DETERMINATION:

The Department has determined that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected private persons than the action proposed.

ASSESSMENTS, MANDATES, AND FISCAL IMPACT:

This action will neither create nor eliminate jobs in the State of California, nor result in the elimination of existing businesses, or create or expand businesses in the State of California.

The Department, in proposing amendments to these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document.

The Department determines this action imposes no mandates on local agencies or school districts; no fiscal impact on State or local government, or Federal funding to the State, or private persons. It is also determined that this action does not affect small businesses nor have a

significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states because they are not directly affected by the internal management of State prisons; and no costs or reimbursements to any local agency or school district within the meaning of Government Code, Part 7, Section 17561. The Department has made an initial determination that the proposed action will have no significant effect on housing costs. Additionally, there has been no testimony or other evidence provided that would alter the Department's initial determination.

PUBLIC HEARING COMMENTS:

Public hearing was held on March 15, 2011, at 9:00 a.m.

No one commented at the public hearing.

WRITTEN PUBLIC COMMENTS:

Commenter #1:

Comment 1A: Commenter states the proposed regulation seeks to add the words "or other person" to the text and permit prison officials to validate "any person" including people in the community. Commenter also states that he does not see how the CDCR can assert this would have no economical impact and believe this practice is lawful.

Accommodation: None

Response 1A: Peace Officers employed by the Department may conduct complex criminal investigations involving inmates, parolees to include any person(s) identified as an associate of inmates and parolees. Criminal acts by any person that violates local, State, or federal laws and/or presents a threat to public safety and/or the security of California State Prisons may be investigated and referred to the District Attorney for criminal prosecution by departmental peace officers conducting the investigation.

Consistent with the authority to investigate and refer for prosecution, inmates, parolees, and any person involved in criminal acts, the Department has a penalogical interest in the investigating, identifying, and validating of inmates, parolees, and any person determined to be a gang member or associate who through their gang involvement presents a threat to public safety and the security of California State Prisons. Relative to validation, the same procedural and due process protocols are applied to any person as are afforded inmates and parolees under the jurisdiction of the Department.

Comment 1B: Commenter states the standard that applies to gang validations is the "some evidence standard" and CDCR must have some evidence that the inmate is an associate or member of a prison gang as listed in Section 3378 (c)(8). The legal standard to validate a person on the street requires the individual commit a gang related act (crime) and a jury find that act was committed on behalf of the gang "beyond reasonable doubt." Commenter contends this policy seeks to curtail the "beyond reasonable doubt" and "activity" standard. Commenter states that

allowing Correctional Counselors to validate members of the community is illegal and will overwhelm the gang data bases and trigger numerous lawsuits; and contends that under the present policy, Correctional Counselors will abuse the process by validating family members for writing validated inmates. Commenter feels that is clearly illegal and exceeds what is permissible under the due process clause.

Accommodation: None

Response 1B: Commenter is accurate regarding the “some evidence” standard for validation of inmates and parolees. However, the “beyond a reasonable doubt” standard applies to criminal prosecutions in a court of law and does not apply relative to this revision.

The Department clearly has a penalogical interest in identifying and validating inmates, parolees, and any person who, through their affiliation as a member or associate of a gang, presents a threat to public safety and the security of California State Prisons. The Department recognizes the complexity of gang investigations and therefore requires that only well trained investigators prepare and submit validations for review.

It is not the current practice, nor the intention of the Department to have Correctional Counselors conduct complex gang investigations and prepare and submit validations for review.

Comment 1C: Commenter states since Hispanics make up the majority of validated inmates and Hispanics who correspond with the inmates are also going to be validated. Commenter contends this will open the floodgates to countless discriminatory suits and that CDCR does not have sufficient staff to conduct these validations.

Accommodation: None

Response 1C: The Department recognizes the complexity of gang investigations and therefore requires that only well trained investigators prepare and submit validations for review. Validation is based on a totality of evidence and therefore requires more than mere correspondence with a validated gang member or associate to validate inmates, parolees, or any person, as a member or associate of a gang. The Department recognizes that gangs have no racial or cultural boundaries and therefore conducts gang investigations without racial or cultural bias.

Comment 1D: Commenter states if CDCR is going to start validating people on the streets, the CCR Title 15, Section 3378(c)(6) mandates a right to notice and an opportunity to be heard. The California Penal Code and 6th Amendment mandates proof beyond a reasonable doubt and jury trial. Commenter asks where CDCR is going to get the staff and resources to handle such a procedure. Commenter also states prison guards only have authority over inmates and are unqualified and unprepared to dictate the lives of free people or labeling them as gang members or associates and states this should be left to outside law enforcement.

Accommodation: None

Response 1D: The same procedural and due process protocols are applied to any person as are afforded inmates and parolees under the jurisdiction of the Department. The Department recognizes the complexity of gang investigations and therefore requires that only well trained investigators prepare and submit validations for review. The departmental investigators are expected to prioritize and manage workload and it is therefore not anticipated that there will be a significant, if any, impact on workload.

Unless charged with a crime in a court of law, the “beyond a reasonable doubt” standard does not apply. Validation only requires that “some evidence” be present indicative of gang involvement.

Peace Officers employed by the Department may conduct complex criminal investigations involving inmates, parolees, and any person identified as an associate of inmates and parolees. Criminal acts by any person that violates local, State, or federal laws and/or presents a threat to public safety and/or the security of California State Prisons are investigated and referred to the District Attorney for criminal prosecution by departmental Peace Officers conducting the investigation.

Comment 1E: Commenter contends the proposed policy has nothing to do with the Castillo Settlement, which not only did not mention the validation of community members, but was limited to prisoner validation.

Accommodation: None

Response 1E: The revisions are intended to apply principles accepted and agreed to in the Castillo Settlement to all evidence considered in the validation. Additionally, the revisions assure the same procedural and due process protocols are applied to any person as are afforded inmates and parolees under the jurisdiction of the Department.

The Department clearly has a penalogical interest in identifying and validating inmates, parolees, and any person who, through their affiliation as a member or associate of a gang, presents a threat to public safety and the security of California State Prisons.

Commenter #2:

Comment 2A: Commenter contends that the use of validated gang members and associates as direct links, with or without 6 months grace period, is unreasonable unless such association is restricted to gang members and associates validated as active gang members and associates. Commenter also contends the term “validated” applies to inactive and dropout gang members and associates and recommends language be included to specify direct link with inmates validated as active gang members and associates, which would automatically include dropouts/inactives who reinvolve themselves with gang activity.

Accommodation: None

Response 2A: No revisions were made to this section relative to the reasonableness of using validated gang members and associates as direct links in the validation process. The current

policy language, including that language referencing the use of “direct links,” was agreed upon in the Castillo Settlement and has been accepted as policy. The Department contends that the current language regarding establishing “direct links” is appropriate and requires no change.

Comment 2B: Commenter states this proposed amendment regarding direct link is inconsistent with the *Castillo v Alameida* Settlement, which omitted any reference to “Direct Link,” but did seek to have existing “Direct Link” policy published. Commenter also states Castillo’s Settlement restricted association evidence (in photographs) to validated gang members/associates, or those validated within 6 months of the date photo was taken. Commenter contends the settlement distinguishes between two categories of association that is permissible with photographs. 1) Validated persons, which qualifies as a direct link. 2) Those validated within six months of date of activity, which does not qualify as a direct link and is mere association. Commenter contends that to construe otherwise, conflicts with the Settlement Agreement and its intent.

Accommodation: None

Response 2B: Current language regarding the use of photographic evidence and establishing direct links to validated gang members and associates was agreed to by all parties subsequent to the Castillo Settlement. Commenter’s interpretation is not consistent with the terms of the settlement and policy adopted as a result of the Castillo Settlement.

Comment 2C: Commenter contends that if the amendment is to be consistent with the *Castillo v. Alameida* Settlement Agreement, the proposed regulation change should include the other agreed upon photograph language if it is to be consistent with the settlement language. Commenter suggests the following language: “The date of gang activity/association used as a direct link shall be no older than six years.”

Accommodation: None

Response 2C: The Department agreed to language specifically limiting the use of photographic evidence in that “no photograph shall be considered for validation purposes that is estimated to be older than six years.” The revisions are intended to apply principles relative to use of all evidence considered for validation purposes, specifically in establishing direct links to validated gang members and associates. This principle was accepted and agreed to in the Castillo Settlement.

Comment 2D: Commenter contends text in the 2009 Title 15, Subsection 3378(c)(8)(F) contains an error in which the word “course” was cited that should have been “source.”

Accommodation: None

Response 2D: In doing research, the Department found this to be a typographical error. Under the regulation File Number 06-043-21-03S, the word “source” was in the text and for some unexplained reason was changed to “course” in the official Westlaw version. Therefore, the Department will submit final text with a correction to now change the word back to “source.”

This should be considered a non-substantive change for corrective purposes. There are no other changes to this subsection.

Commenter #3:

Comment 3A: Commenter is concerned about the frequent use of the “direct link” application that is used to validate unknown subjects/inmates as gang affiliates. Commenter contends there is no direct established criteria for “whom” will be validated when a gang affiliate is found in possession of another inmate’s personal information, retaining it unauthorized. Commenter also contends the information is utilized to validate the non-validated inmate rendering him defenseless, unwilling, and unknowingly associated with the validated affiliate.

Accommodation: None

Response 3A: Current policy requires that “staff shall articulate why, based on either the explicit or coded content, the written material is reliable evidence of association or membership with the gang.” As such, it is incumbent upon the investigator, based on their training, experience, and knowledge of the gang, to determine the significance of the evidence considered. The subject of the validation is additionally given an opportunity to be heard and their opinion considered in both the investigative and review process. The Department asserts that current regulatory language is appropriate.

Comment 3B: Commenter states there is no distinction that secures inmates who do not participate in gang associations as “neutral” when any gang affiliate obtains and retains personal information of a non-affiliate and ultimately the non-affiliate is validated, reclassified, and housed in a SHU setting.

Accommodation: None

Response 3B: Although the above comment does address an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to GC Section 11346.9(a)(3), it is either insufficiently related to the specific action or actions proposed, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

Comment 3C: Commenter provides the following personal information:

- Commenter states he was recently validated because two inmates who were validated gang associates obtained his name, cell location, and prison number without his knowledge or authorization while he was housed in SHU on unrelated disciplinary infractions.
- Commenter also states during cell searches of these same two inmates on two different occasions, his information was found and confiscated by staff.
- Commenter states that upon his release from SHU, he was retained due to the two inmate’s possessions and validated because the information was said to be a “direct link.” Commenter also states he is currently in litigation with this matter.

Commenter contends this can be avoided for future inmates if the Title 15 had a distinct amendment that holds: “no inmate as an associate to a prison gang unless found in his possession

any information directly linking him to a member/associate.” Commenter states this possession alone shows “willing, knowing” participation with known gang affiliates and it offers a safeguard to inmates who have no knowledge or control over the actions, possessions, or sinister desires of others who may or may not be validated gang members/associates. Neutral inmates need a safeguard from “forced validation” and investigators need clarity for culpable inmates.

Accommodation: None

Response 3C: Although the above comment does address an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to GC Section 11346.9(a)(3), it is either insufficiently related to the specific action or actions proposed, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

Commenter #4:

Comment 4A: Commenter states the proposed language in Sections 3378(c)(3) and (4), “who is validated” needs more clarity. Commenter offers the following: His old cellmate was picked up for validation in May 2010 and in October 2010 commenter was picked up for validation and given one point against him for mentioning his cellmate’s name in a kite he wrote. Commenter asks if it makes sense that he was validated for mentioning the name of the cellmate who is only under investigation and not yet validated.

Accommodation: None

Response 4A: Although the above comment does address an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to GC Section 11346.9(a)(3), it is either insufficiently related to the specific action or actions proposed, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

Comment 4B: Commenter contends the proposed language in Sections 3378(c)(3) and (4), “validated within six months” needs more clarity, because it seems that anyone who is validated over six months cannot be used against inmates. Commenter states he is being linked to someone that he has never heard, who was validated years ago and asks:

- Would the link need to have been validated (notwithstanding inmates under investigation) as a gang member or associate within six months to the investigation of commenter’s validation?
- Would this exclude anyone validated over six months ago from the time of commenter’s investigation?
- Does this means that anyone validated over six months ago from commenter’s investigation is not a direct link?

Accommodation: None

Response 4B: The proposed language regarding use of photographs states in part, “Validation of an inmate/parolee or any person as a member of a prison gang shall require that at least one (1) source item be a direct link to a current or former validated member or associate of the gang or an inmate/parolee or any person who is validated by the department within six (6) months of the established or estimated date of activity identified in the evidence considered.” The direct link would have to be currently validated or validated within six months of the established or estimated date of activity, not the date of the investigation. Any person validated any time prior to or within six months of the established or estimated date of activity could be used to establish a direct link.

Commenter #5:

Comment 5A: Commenter opposes the propose change to Section 3378(C)(3) of the Title 15 and states that adding “or any person” is extremely vague and leaves open the possibility to have CDCR effect friends and relatives who unknowingly associate themselves to a prisoner/parolee, will be validated. Commenter states “any person” on the streets is not privy to CDCR regulations and policy and for the most part are trying to keep their loved one linked to the free world and by validating “any person,” CDCR is taking steps towards “big brother” that will lead our loved ones to either cut us loose or be forced to no longer be able to visit or write.

Accommodation: None

Response 5A: The Department clearly has a penalogical interest in identifying and validating inmates, parolees, and any person who, through their affiliation as a member or associate of a gang, presents a threat to public safety and the security of California State Prisons. Any person, who knowingly promotes, furthers, or assists a prison gang or disruptive group, poses a threat to public safety and the security of California State Prisons. It is not currently, nor has it ever been, the Department’s intent to validate friends and relatives for trying to “keep their loved ones linked to the free world.”

Comment 5B: Commenter provides the following text to Section 3378(c)(3), “or to an inmate/parolee or any person who is validated by the Department within six months of the established or estimated date of activity identified in the evidence considered.” Commenter states this will also lead to innocent people being caught up in the web of validation. Commenter also states commenter’s mother now gets a gang point for a visiting room photo with him that was taken six months before he was validated and also gets a gang point for writing him a letter six months before he was validated, making her one point away from never being able to write or visit again. Commenter asks how is anyone to know when someone else will be validated six months from now and states that the CDCR does not even notify “any person” when someone is already validated much less when they are six months away from it. Commenter also states this rule will lead to first amendment right violations, due to innocent speech now becoming gang points six months from now and innocent association could lead to validation before the first person is even validated.

Accommodation: None

Response 5B: Although the above comment does address an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to GC Section 11346.9(a)(3), it is either insufficiently related to the specific action or actions proposed, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

Commenter #6

Comment 6A: Commenter requests that the term “any person” be deleted from the proposed amendments to Title 15 from Sections 3378(c)(3) and (4), as the proposed amendments would expand the scope of individuals CDCR can validate as gang “members” and “associates” beyond its current scope of prison inmates and parolees to also include “any person,” even those not under CDCR’s jurisdiction. Commenter contends this expansion would violate the constitutional due process rights of prisoners and parolees as well as other persons not under CDCR jurisdiction. Commenter contends under current regulations, CDCR has authority to validate only inmates and parolees as gang member or associates because they fall under the jurisdiction of CDCR and have the ability to invoke procedural safeguards that exist to ensure validation is correct.

Accommodation: None

Response 6A: Peace Officers employed by the Department may conduct complex criminal investigations involving inmates, parolees to include any person(s) identified as an associate of inmates and parolees. Criminal acts by any person that violates local, State, or federal laws and/or presents a threat to public safety and/or the security of California State Prisons may be investigated and referred to the District Attorney for criminal prosecution by departmental peace officers conducting the investigation.

Consistent with the authority to investigate and refer for prosecution, inmates, parolees, and any person involved in criminal acts, the Department has a penological interest in the investigating, identifying, and validating of inmates, parolees, and any person determined to be a gang member or associate who through their gang involvement presents a threat to public safety and the security of California State Prisons.

Relative to validation, the same procedural and due process protocols are applied to any person as are afforded inmates and parolees under the jurisdiction of the Department. As such, any person will have an opportunity to be heard with regard to evidence considered in the validation. Application of due process protocols uniformly, to include any person, will insure the constitutional due process rights of prisoners and parolees, as well as other persons not under CDCR jurisdiction, are not violated.

Comment 6B: Commenter contends that under the proposed amendment, CDCR would have the authority to validate “any person” as a gang member or associate and an individual who is not an inmate or parolee cannot challenge an incorrect gang validation. Commenter states that only prisoners or parolees may avail themselves of the CDCR grievance procedures, and any appeal must be filed within a month after validation. (CCR Title 15,

Sections 3084(a) and 3084.1(a)). Commenter also states that subjecting person to gang validation without affording them adequate procedural safeguards raises serious constitutional questions for two distinct reasons:

- CDCR's wrongful validation of a non-prisoner may implicate the liberty interest of prisoners and parolees who are under CDCR's jurisdiction, because once a person is validated as a gang member/associate, other prisoners' or parolees' contacts with such person may be grounds for gang validation. *See e.g.*, Proposed Title 15, Section 3378(c)(3)(allowing for validation of a prisoner or parolee if there is documentation showing "a direct link...to any person who is validated by the department..."). Commenter contends that under the proposed regulation a CDCR prisoner could be validated as a gang member, sentenced to the SHU, and lose conduct credits – based primarily on a link to a non-prisoner who has never had the opportunity to challenge CDCR's allegation of gang activity. That would violate the well established tenet that gang validation, the SHU term, and loss of good time credits that follow, cannot be completed without adequate procedural due process protections. *Madrid v. Gomez*, 889 F. Supp. 1146 1274 (N.D. Cal. 1995); *Superintendent. Massachusetts Correctional Institution v. Hill*, 472 U.S. 445-55 (1985).
- The proposed regulations provide no procedural safeguards to protect a person who is not under the custody or control of CDCR from a wrongful validation. Commenter contends that if a previously validated person later comes into CDCR custody, he or she could be subject to an indefinite term in the SHU and to loss of conduct credits as a result of the earlier validation they had no opportunity to challenge. That, too, would be unconstitutional. *See, e.g., Madrid, supra, Superintendent, Massachusetts Correctional Institution, supra.*

Accommodation: None

Response 6B: Commenter made a reference to CCR Title 15, Section 3084(a) which does not exist. Commenter's concerns relative to concern 6B have been addressed in Response 6A.

Commenter #7:

Comment 7A: Commenter states the CDCR is under a legal obligation to adhere to the Settlement Agreement and requests to adopt and/or amend the regulations to the CCR Title 15. Commenter provides that specifically, in the Settlement Agreement of *Castillo v. Alameida*, U. S District Court for the Northern District of California, No. 0-94-2847-MJJ-JCS, the CDCR specifically agreed that a: "prisoner will not receive an indeterminate SHU term as a validated gang member or associate without first being found to be a current, active gang member or associate...Defendants agree that these requirements will be reflected in Title 15 and/or the DOM." (Settlement Agreement at Para. 24.) Commenter contends this "current, active determination" is not reflected in CCR Sections 3341.5 or 3378 (nor the DOM) or anywhere in the CCR Title 15. Commenter also contends the regulations are vague at best and do not clearly state the legal mandate. Commenter requests that clearly defined rules and regulations be adopted and/or amended reflecting the "Current, Active Determination" as set forth in Paragraph 24 of the Castillo Settlement.

Accommodation: None

Response 7A: CCR section 3378(c)(1) defines current activity as follows; “Current Activity is defined as any documented activity within the past six years consistent with Section 3341.5 (c)(5).” This language is agreed to and adopted into policy as a result of the *Castillo v. Alameida* Settlement Agreement.